IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEPHEN PALMER DOWDNEY, JR., Appellant.	)))))))))))	No. 59078-2-I DIVISION ONE UNPUBLISHED FILED: August 10, 2009

Cox, J. — Stephen Dowdney moves for reconsideration of the decision we filed on April 13, 2009. We grant the motion, reverse his convictions for two counts of second degree assault and one count of first degree robbery, and remand for retrial on all counts. We also vacate the sentencing condition imposing substance abuse evaluation and treatment in connection with community custody since it is not supported by this record. There is sufficient evidence to support the robbery conviction, which we reverse on other grounds. And the statement of additional grounds does not warrant any further relief.

In early December 2004, Dowdney and his friend, Patrick Bartshe, were both at Larry's Market in Bellevue. How they got there and what took place were the subjects of conflicting testimony. What is clear is that a Larry's security officer, Felix Arena, observed Bartshe steal wine from the store. When Bartshe

left the store, Arena and a store supervisor followed him. Arena and the supervisor tried to stop Bartshe in the parking lot. A physical confrontation followed. At the end of the confrontation, Bartshe was on the ground, injured by a bottle that Dowdney threw. Arena was injured by the same bottle. Dowdney fled the scene, and police responded to a call from Larry's. They arrested Bartshe at the scene.

The State charged Bartshe for his role in this incident. He pled guilty to second degree theft and third degree assault.

The State charged Dowdney with second degree assault (count I) and first degree robbery (count II), each committed against Arena. The State also charged Dowdney with first degree assault (count III) against Bartshe. All counts included deadly weapon special allegations.

At trial, Dowdney requested a third degree theft instruction as a lesser included instruction for the robbery instruction for count II. The court declined to give a theft instruction, leaving the first degree robbery instruction as the sole instruction for the charge on that count.

A jury convicted Dowdney as charged on counts I and II. But it convicted him on the lesser included offense of second degree assault on count III. The jury found that Dowdney was armed with a deadly weapon at the time he committed each offense.

The trial court imposed standard range sentences for each of the three convictions together with the mandatory enhancements. The court also imposed

a substance abuse evaluation and treatment condition in connection with community custody.

Dowdney appeals.

LESSER INCLUDED OFFENSE INSTRUCTION

Dowdney argues that his conviction for first degree robbery must be reversed because he was entitled to an instruction for third degree theft and the court declined to give it. We agree and hold that there was substantial evidence to give such an instruction. The failure to give the instruction requires reversal.

"An instruction on the close relative of an inferior degree offense, a lesser included offense, is warranted when two conditions are met: '[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed.'"[1] The two conditions, the legal prong and factual prong, are based on the tests set forth in State v. Peterson[2] and State v. Workman.[3] As for the factual prong of the test, its purpose "is to ensure that there is evidence to support the giving of the requested instruction."[4] This

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[1] State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

[2] 133 Wn.2d 885, 948 P.2d 381 (1997).

[3] 90 Wn.2d 443, 548 P.2d 382 (1978); Fernandez-Medina, 141 Wn.2d at 455. In Fernandez-Medina, the supreme court states that "the test for determining if a party is entitled to an instruction on an inferior degree offense differs from the test for entitlement to an instruction on a lesser included offense only with respect to the ***legal*** component of the test." Id. (emphasis added).

factual test requires a showing more particularized than that required for other jury instructions.[5] Specifically, the "evidence must raise an inference that ***only*** the lesser included/inferior degree offense was committed to the exclusion of the charged offense."[6]

"[W]hen substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense, the factual component of the test . . . is satisfied." The remedy for failure to give a lesser included instruction when one is warranted is reversal.[7]

We review a trial court's refusal to give an instruction, based on the sufficiency of evidence to give that instruction, for abuse of discretion.[8]

Here, the State expressly concedes that the legal prong of the Workman test is satisfied. Thus, the question is whether the evidence "raise[s] an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense [first degree robbery]."[9]

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[4] Fernandez-Medina, 141 Wn.2d at 455.

[5] Id.

[6] Id. (citing State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (lesser included offense instruction)) (additional emphasis added).

[7] Fernandez-Medina, 141 Wn.2d at 461-62.

[8] State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

[9] Fernandez-Medina, 141 Wn.2d at 455.

RCW 9A.56.020(1)(a) defines theft as follows:

> To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services . . . .

RCW 9A.56.050(1) defines third degree theft as follows:

> theft of property or services which (a) does not exceed two hundred and fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

Washington's accomplice liability statute, RCW 9A.08.020, states in relevant part:

> (3) A person is an accomplice of another person in the commission of a crime if:
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> (a) With knowledge that it will promote or facilitate the commission of the crime, he
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> (i) solicits, commands, encourages, or requests such other person to commit it; or
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> (ii) aids or agrees to aid such other person in planning or committing it.[10]

"One does not aid . . . unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed."[11]

Here, the jury instruction included the above statutory language, and also stated:

> The word "aid" means all assistance whether given by

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[10] RCW 9A.08.020(3).

[11] In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

> words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
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> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.[12]

At trial, Bartshe testified that it was Dowdney's idea to steal some wine. He also testified that he and Dowdney, riding together in his car, went to Larry's Market to implement their agreement. When asked whether the two men had a discussion about committing theft at Larry's that evening, Bartshe replied, "Yeah, I believe so. Yeah, there was."

Bartshe went into the store and purchased several items but did not pay for two bottles of concealed wine. Upon leaving the store, a man, later identified as Arena, tried to stop Bartshe in the parking lot. Bartshe testified that the man said something to him and may have identified himself as a security guard. But Bartshe kept walking, thinking the man was "just some regular Joe." Bartshe testified that he "pushed [Arena] out of the way," and that all he remembered after that was being on the ground actively struggling with Arena.

Based on this evidence from Bartshe, a jury could have found that Dowdney planned the theft with Bartshe and went to the store with him to assist in the commission of the crime of theft. Under this theory, Dowdney is potentially liable as an accomplice for the theft that Bartshe committed by

[12] Clerk's Papers at 93 (Jury Instruction 14).

stealing wine from Larry's Market. He agreed with Bartshe to the commission of the crime and then accompanied Bartshe to the scene of the crime. That Dowdney did not appear to do anything more at the scene of the crime does not negate the fact that he was acting as an accomplice to theft when Bartshe stole the wine and proceeded to the parking lot.

Our reading of the record indicates that the trial court believed that a lesser included instruction was not warranted once Bartshe pushed Arena in the parking lot. The court concluded that the pushing constituted force to retain the stolen merchandise, elevating the crime from theft to robbery.

We do not agree with that analysis. First, there was no evidence in the record to support the view that Dowdney knew that Bartshe was going to use force to retain the stolen wine. Thus, under the Roberts and Grendahl line of cases, Dowdney could not have been an accomplice to robbery at that point of the incident. The evidence only supports the view that at the point Bartshe pushed Arena, Dowdney was arguably an accomplice to theft, no more.[13]

Second, even if Dowdney was an accomplice to the theft, his use of force (throwing the bottle that struck Bartshe and Arena) permits more than one reasonable inference. While Dowdney's use of force could be viewed as elevating the theft to robbery, that is not the only conclusion to reach on this

[13] See State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) (knowledge by the accomplice that principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow); accord State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002).

record.[14] Dowdney testified that he did not know that Arena was a security officer, but believed that Arena was hurting Bartshe during the physical confrontation between the two. According to Dowdney, he threw the bottle intending to stop Arena from injuring Bartshe, not to further a robbery. Moreover, the State agreed to a defense of others instruction, an indicator that there was sufficient evidence in the record to support Dowdney's argument that the bottle throwing was to defend, not to further a robbery. Consequently, Dowdney's use of force does not negate his argument that he was an accomplice only to theft, not robbery.

The State argues that the trial court properly refused to give the instruction because the evidence is insufficient to support a finding that Dowdney was an accomplice in the theft. The State relies on In re Welfare of Wilson,[15] State v. Robinson,[16] and State v. Amezola.[17] These cases are distinguishable.

In Wilson, a group of young people stole weather stripping from an office building, fashioned it into a rope, and strung it across a highway.[18] From time to

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[14] See Fernandez-Medina, 141 Wn.2d at 455-56 ("When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.").

[15] 91 Wn.2d 487, 588 P.2d 1161 (1979).

[16] 73 Wn. App. 851, 872 P.2d 43 (1994).

[17] 49 Wn. App. 78, 741 P.2d 1024 (1987).

[18] Wilson, 91 Wn.2d at 489.

time, the rope was pulled taut across the road.[19] The court found Wilson guilty of abetting because he had given support and encouragement to others in the group engaged in activities that constituted reckless endangerment.[20] In reversing the conviction, our supreme court noted that Washington law has consistently stated that "physical presence and assent alone are insufficient to constitute aiding and abetting" under the accomplice liability statute.[21] "One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed."[22] The court reversed, holding that Wilson's presence, knowledge of the theft, and acquaintance with the participants was not sufficient to support his conviction.[23]

Here, unlike in Wilson, the evidence shows that it was Dowdney's plan to steal the wine and that he accompanied Bartshe to the store to implement the plan. Dowdney's role here is beyond that of mere presence, knowledge of the theft, and acquaintance with the principals.

In Robinson, the defendant, a juvenile, drove his friends around in his mother's car.[24] Without warning, the front passenger jumped out of the slow

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[19] Id.

[20] Id.

[21] Id. at 491.

[22] Id.

[23] Id. at 490-92.

moving car, grabbed a bystander's purse, and jumped back into the car.[25] Robinson drove away but demanded that his friend get rid of the purse.[26] Robinson dropped his friend off but did not report the incident to police.[27] The trial court convicted Robinson of second degree robbery as an accomplice.[28]

On appeal, this court reversed, holding that at the point the friend got back into the car after stealing the purse, the robbery was complete.[29] Thus, Robinson could not have aided the crime.[30] The evidence also showed that Robinson did not associate himself with the purse snatching, participate in it with desire to bring it about, or seek to make it successful by his own actions.[31] Here, in contrast, evidence shows that Dowdney helped plan the theft before it was carried out by Bartshe and accompanied him to the store where the theft took place.

In Amezola, a jury convicted Ramirez of possession of heroin with intent to deliver based on accomplice liability.[32] She appealed, arguing the evidence

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[24] Robinson, 73 Wn. App. at 852.

[25] Id.

[26] Id. at 853.

[27] Id.

[28] Id. at 844.

[29] Id. at 857.

[30] Id.

[31] Id.

[32] Amezola, 49 Wn. App. at 83.

was insufficient to establish that she was an accomplice to the drug sale and distribution operation conducted by others in the home where she lived.[33] Evidence showed that Ramirez often cooked or washed dishes in the kitchen while others cut and packaged heroin for sale.[34] She never packaged, cut or handled the heroin, never went on deliveries or answered the phone.[35] Other defendants testified she was not involved with the drug dealing and aside from cooking the meals, Ramirez usually stayed in her room.[36]

On appeal, this court reversed because the evidence did not support an inference that Ramirez was liable as an accomplice. This court reasoned that Ramirez's cooking and cleaning activities were distinct from the criminal acts charged. Moreover, her connection to the crime amounted to no more than physical presence and assent.[37] In contrast, here, a jury could rationally believe from Bartshe's testimony that Dowdney was the person who came up with the idea to steal the wine.

Furthermore, to the extent that Dowdney and Bartshe discussed how to commit the theft, Dowdney promoted or facilitated the crime. When testifying, Bartshe described their discussion prior to the theft:

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[33] Id. at 89-90.

[34] Id. at 82-83.

[35] Id. at 83.

[36] Id.

[37] Id. at 89-90.

> Q: [W]hat, if any, direct discussion you had [sic] had about going into how the – how the wine was going to be stolen at Larry's, for example?
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> A: Just go over in the cellar where we always go.
>
> Q: And then is it true that there is never a discussion as to who was going to steal wine?
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> A: That's true.
>
> Q: That you decided to do that because you were going into Larry's yourself?
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> A: Yep.[38]

Next, the State argues that Dowdney became an accomplice only after the robbery commenced (after Bartshe pushed the security guard), but while the robbery was still in progress. Thus, according to the State, no rational juror could have concluded that Dowdney committed theft but not robbery. Nevertheless, the relevant test is whether the evidence supports a reasonable inference that only the lesser crime was committed. As we have discussed, there is evidence to support such an inference. The State's view of the evidence is simply too narrow.

Relying on State v. Fowler,[39] the State next asserts that Dowdney failed to produce affirmative evidence that he was an accomplice to the theft. The State suggests that in arguing for a lesser included offense instruction, Dowdney cannot rely on any evidence in the record, but only evidence that he presents.

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[38] Report of Proceedings (August 14, 2006) at 101-02.

[39] 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

This view of the law is patently incorrect.

Neither Fowler, nor the case it cites, requires that a defendant who seeks a lesser included offense instruction must rely only on evidence he or she presents to support the instruction. Certainly, "[i]t is not enough that the jury might simply disbelieve the State's evidence. . . . some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given."[40] In short, it is the presence of substantial evidence in the record to support the view that ***only*** the lesser crime was committed that requires the giving of the lesser included instruction. It does not matter who presents the evidence.[41]

The remedy for failure to give a lesser included instruction when one is warranted is reversal.[42] Accordingly, we reverse the first degree robbery conviction in this case and remand for a new trial on that count.

DOUBLE JEOPARDY

Dowdney also argues that his conviction for second degree assault against Arena should be vacated. We disagree.

The supreme court has recently reaffirmed its holding in State v.

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[40] Fowler, 114 Wn.2d at 67; see also State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904 (1987).

[41] Fernandez-Medina, 141 Wn.2d at 456.

[42] Id. at 462.

[43] 153 Wn.2d 765, 108 P.3d 753 (2005).

Freeman[43] that "when an assault elevates a robbery to first degree, generally the two offenses are the same for double jeopardy purposes."[44] To avoid a double jeopardy violation, convictions for first degree robbery and second degree assault generally merge unless the two crimes have an independent purpose or effect.[45]

This is not a per se rule, but subject to critical analysis of the facts in each case.[46] Where courts have found that convictions for assault and robbery stemming from a single act are the same for double jeopardy purposes, the conviction for assault must be vacated at sentencing.[47]

At Dowdney's sentencing hearing, the State conceded that Freeman controls this case. Accordingly, the State recommended that the judge merge the conviction for second degree assault against Arena (count I) with the conviction for first degree robbery (count II). The State proposed that the way to handle the merger was to preserve the count I conviction on the judgment and sentence, to note that it merged into count II, and then not to sentence Dowdney on the assault. The trial court followed the State's suggestion. The judgment and sentence contains a note to this effect.

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[43] 153 Wn.2d 765, 108 P.3d 753 (2005).

[44] State v. Kier, 164 Wn.2d 798, 801, 194 P.3d 212 (2008).

[45] Freeman, 153 Wn.2d at 780.

[46] Id.

[47] Id.; State v. Elmi, 138 Wn. App. 306, 321, 156 P.3d 281 (2007).

To the extent the State argues for the first time on appeal that Freeman does not control, we reject this new argument. It conflicts with the State's position below, and it also conflicts with State v. Kier,[48] which reaffirms the holding in Freeman.[49]

Dowdney argues that the trial court erred by not vacating the conviction on count I. He would be correct if we had not reversed the first degree robbery conviction. Given that we have reversed that conviction, there is no double jeopardy problem, at present.

However, if on remand, a jury convicts him of first degree robbery for a second time, the trial court must then decide whether to vacate the conviction for second degree assault, as current law would require.[50]

EVIDENTIARY RULINGS

Evidence of Prior Bad Acts

Dowdney argues that the court abused its discretion in admitting evidence of his prior bad acts. We agree.

ER 404(b) provides that evidence of prior crimes, wrongs, or acts is not admissible if it is offered to establish a person's character or to show he acted in

[48] 164 Wn.2d 798, 194 P.3d 212 (2008).

[49] Id. at 801.

[50] See Elmi, 138 Wn. App. at 321 (remanding to vacate assault conviction where trial court found double jeopardy violation, did not vacate but, instead, simply declined to impose punishment on that count).

conformity with that character.[51] Such evidence may be admitted, however, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[52] Another recognized exception to ER 404(b) is the res gestae or "same transaction" exception.[53] Under this exception, evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide context for events close in time and place to the charged crime.[54]

Before admitting evidence of prior bad acts under this rule, the trial court must find by a preponderance of the evidence that the misconduct occurred, identify the purpose for which the evidence is sought to be admitted, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect.[55] This analysis must be conducted on the record.[56] If the court admits the evidence, a limiting instruction must be given.[57] The interpretation of an evidentiary rule is a question of law

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[51] ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

[52] ER 404(b).

[53] State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004); see also State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981).

[54] Lillard, 122 Wn. App. at 431-32 (uncharged thefts during same period of time admissible).

[55] State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

[56] Foxhoven, 161 Wn.2d at 175.

[57] Id.

that we review de novo.[58] When the trial court has correctly interpreted the rule, we review the court's decision for an abuse of discretion.[59] Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.[60]

Here, the State sought to admit evidence of uncharged thefts that Bartshe and Dowdney committed earlier in the day on December 9 under ER 404(b). The State offered the evidence to show Dowdney's "knowledge of the criminal activity and his intent when he arrived . . . ."[61]

The judge initially refused to admit the evidence under ER 404(b), stating, "I see it as part of continuum of activity that night in the same way that cases have addressed . . . a series of robberies, and we get to robbery number C, and A and B come in because they are part of a chain of events."[62] Thus, the court admitted the evidence as evidence of res gestae.

Dowdney argues that the court abused its discretion by admitting this evidence because it failed to find by a preponderance that the prior thefts actually occurred and also failed to conduct a balancing of probative value and prejudicial effect on the record. He argues that the admission of this evidence

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[58] Id. at 174.

[59] Id.

[60] Id.

[61] Clerk's Papers at 160.

[62] Report of Proceedings (August 10, 2006) at 176-77.

changed the outcome of his trial.

We note that res gestae is expressly recognized as one of the exceptions to the general rule against admissibility of prior bad acts evidence.[63] Thus, admission of such evidence is subject to the same requirements as other exceptions to the prohibition against the admissibility of such evidence. Specifically, the court must find by a preponderance that the prior thefts actually occurred, conduct a balancing of probative value and prejudicial effect on the record, and give the jury an appropriate limiting instruction.

The court did not take these steps in this case. Thus, the jury heard evidence of prior uncharged thefts in which Dowdney may have been involved without any limiting instruction. The result was predictable.

State v. Trickler[64] illustrates the problem under circumstances that are similar to those here. In that case, the State charged Trickler with possession of a stolen credit card belonging to Kathleen Nunez.[65] Under ER 404(b), the trial court allowed the State to introduce evidence that at the time the stolen credit card was found, Trickler also possessed personal property belonging to others.[66] For example, Trickler's landlord testified that he found his father's equipment

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[63] Karl B. Tegland, Courtroom Handbook on Washington Evidence, 236 (2008-09).

[64] 106 Wn. App. 727, 25 P.3d 445 (2001).

[65] Id. at 729.

[66] Id. at 733.

and pocket knife in Trickler's car.[67] In addition, police officers testified they found stolen checkbooks and identification cards in Trickler's possession.[68] Trickler was not on trial for possessing any of these other items.[69]

On appeal, the court noted that the record did not reveal whether, in admitting the evidence, the trial court balanced probative value against any unfair prejudicial effect.[70] Moreover, the court observed that the evidence was highly prejudicial to Trickler.[71] Rather than giving the jury a complete picture of the events leading to discovery of the stolen credit card, the evidence allowed the State to prove that Trickler must have known the card was stolen because he was in possession of numerous other allegedly stolen items.[72] The court reversed and remanded for a new trial because admitting this evidence violated the purpose of ER 404(b)—to exclude propensity evidence.[73]

Here, the absence of a limiting instruction also permitted the jury to consider the admitted evidence as evidence of Dowdney's criminal propensity. Because a jury is naturally inclined to treat evidence of other bad acts as

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[67] Id.

[68] Id.

[69] Id.

[70] Id.

[71] Id. at 734.

[72] Id.

[73] Id.

evidence of criminal propensity, we conclude that the admission of this evidence tainted the jury's deliberation on all counts charged.[74] Moreover, the prosecutor's closing argument reinforced the jury's improper use of the evidence. The prosecutor highlighted the earlier thefts that Dowdney and Bartshe had allegedly committed, arguing that the robbery at Larry's Market was planned as a continuation of those activities. The prosecutor immediately then proceeded to argue that Dowdney's theory of the case was not believable or supported by the evidence. The admission of this evidence without a limiting instruction coupled with the sequence of the prosecutor's arguments unfairly encouraged the jury to conclude that the prior thefts proved Dowdney's guilt, thereby rendering his theory of the case less credible.

Prior Crime of Dishonesty

Dowdney argues the trial court erred by misclassifying his prior burglary conviction as a crime of dishonesty and admitting it under ER 609 to impeach his testimony. We agree.

ER 609(a)(2) permits a witness to be impeached with evidence of a prior conviction for a crime of dishonesty. Where the conviction at issue is a burglary, it may be admitted to impeach the witness only if it resulted from an entry into a building with intent to commit theft.[75] In determining whether a burglary was

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[74] See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (jurors naturally inclined to reason that having previously committed a crime, the accused is likely to have reoffended).

[75] State v. Schroeder, 67 Wn. App. 110, 117, 834 P.2d 105 (1992).

committed with intent to commit theft or some other crime of dishonesty, a trial court should examine the facts underlying the conviction.[76] A probable cause certification is not sufficiently reliable to establish the underlying intent of a burglary, absent an indication by the defendant that it is true.[77]

Here, the trial court relied only on the certification of probable cause from Dowdney's prior burglary conviction to determine the intent of that burglary. The court concluded that Dowdney's intent in the burglary was to steal something and admitted evidence of the prior conviction. This was incorrect.

The sole purpose of admitting this evidence was to aid the jury in assessing the truth of Dowdney's testimony.[78] Because Dowdney's credibility was crucial in this case, the improper admission of this evidence undoubtedly tainted the jury's deliberations on all counts. Considering the record as a whole, we conclude that other properly admitted evidence, including a prior theft conviction and Dowdney's own testimony that he went to Larry's Market to purchase marijuana on the day of the incident, does not render this error harmless.

In sum, we conclude these evidentiary errors require reversal of Dowdney's two assault convictions.

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[76] Id. at 118.

[77] State v. Black, 86 Wn. App. 791, 794, 938 P.2d 362 (1997).

[78] See ER 609 (permitting admission of evidence of prior convictions "[f]or the purpose of attacking the credibility of a witness").

Dowdney next argues defense counsel was deficient for failing to ensure that the trial court gave a proper limiting instruction. Because we reverse all convictions, we need not address this question. For the same reason, we need not address his cumulative error argument.

CONDITIONS OF COMMUNITY CUSTODY

Dowdney contends that the trial court abused its discretion in imposing a substance abuse evaluation and to follow any recommended treatment as part of his community custody sentence. Because the trial court did not find that a chemical dependency contributed to this offense, we agree.

RCW 9.94A.700(5)(c) authorizes a trial court to order crime-related treatment or counseling services as a condition of community placement. In addition, RCW 9.94A.715(2)(a) permits a court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."[79]

Interpreting these statutes together, Division Two of this court held in State v. Jones[80] that a trial court erred by ordering alcohol counseling as a condition of community custody where the record did not show that alcohol contributed to the defendant's offenses.[81]

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[79] RCW 9.94A.715(2)(a).

[80] 118 Wn. App. 199, 76 P.3d 258 (2003).

[81] Id. at 207-08.

RCW 9.94A.607(1) authorizes a judge to require an offender to participate in rehabilitative programs for chemical dependency as a condition of the sentence where "the court finds that the offender has a chemical dependency that has contributed to his or her offense."

These rules apply here. In this case, there is no finding by the trial court that substance abuse or chemical dependency contributed to Dowdney's offenses. Accordingly, there is no basis for these conditions.

The State argues that the record contains evidence that Dowdney's offenses were substance abuse-related because he wanted to buy marijuana and he stole wine. In addition, Dowdney told the court at sentencing that his trouble with the law often corresponds to his drinking.

We express no opinion on whether this evidence is sufficient to support the required finding to support the imposition of this requirement. The absence of the required finding is sufficient to vacate this invalid portion of the sentence. Accordingly, we vacate this condition and remand for resentencing.

In the remainder of this opinion, we address certain issues because they may recur on remand. Other issues do not require comment because they are now moot.

STATEMENT OF ADDITIONAL GROUNDS

Dowdney raises 12 issues in his statement of additional grounds for review. None warrants additional relief.

Sufficiency of Evidence – Robbery

Dowdney argues there is insufficient evidence to support his first degree robbery conviction. A review of the record shows that this argument is unpersuasive.

Evidence is sufficient to support a conviction if, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[82]

The first degree robbery "to convict" instruction given in Dowdney's trial required the jury to find that the State had proved the following elements beyond a reasonable doubt:

> (1) That on or about the 9th day of December, 2004, the defendant or an accomplice unlawfully took personal property in the presence of another;
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> (2) That the defendant or an accomplice intended to commit theft of the property;
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> (3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person;
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> (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property;
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> (5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice inflicted bodily injury; and
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> (6) That any of these acts occurred in the State of Washington.[83]

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[82] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Here, the evidence permits the inference that Bartshe stole wine and that Dowdney knew he did so, that Bartshe knew Arena was the store's security guard when he used force against him to retain the stolen goods, and that Dowdney likewise used force against Arena to retain the stolen goods. This evidence is sufficient to support his conviction.

Dowdney also argues that the evidence supports, at best, a conviction for attempted robbery because neither he nor Bartshe successfully escaped with the stolen wine. But Dowdney's argument is based on a misunderstanding of Washington law. Washington courts have adopted the "transactional view" of first degree robbery.[84] Under this view, a robbery can be considered an ongoing offense so that, regardless of whether force was used to obtain property, force used to retain it or to escape can satisfy the force element of the statute.[85] "A forceful retention of stolen property in the owner's presence is the type of 'taking' contemplated by the robbery statute . . . ."[86]

Here, the evidence permits the conclusion that Bartshe stole wine, that Downey had knowledge of this fact, and that both men subsequently used force

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[83] Clerk's Papers at 84 (Jury Instruction 7).

[84] State v. Robinson, 73 Wn. App. 851, 856, 872 P.2d 43 (1994).

[85] Id.

[86] State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992) (construing Washington's robbery statute and holding that the force necessary to support a robbery conviction need not be used in the initial acquisition of the property but that retention by way of force against the property owner, of property initially taken peaceably or outside the presence of the property owner, is robbery).

to retain the stolen goods. These actions fall squarely within the robbery statute. The fact that neither man was successful in escaping with the stolen goods does render this an attempted crime.

Constitutional Vagueness of Robbery Statute

For the first time on appeal, Dowdney challenges the constitutionality of the first degree robbery statute, RCW 9A.56.200, arguing it is vague as applied to his conduct. Such an error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right."[87] To satisfy this standard, a defendant must "identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review."[88] Here, Dowdney fails to show how this alleged error prejudiced him. Accordingly, we do not address this claim.

Sufficiency of the Evidence – Second Degree Assault

Dowdney argues that he did not intend to touch or strike Bartshe, thus the jury could not have found him guilty on count III. However, Dowdney fails to recognize that the jury instruction permitted a guilty verdict if jurors found ***either*** that Dowdney (a) intentionally assaulted Bartshe and thereby recklessly inflicted substantial bodily harm, or (b) assaulted Bartshe with a deadly weapon. The jury instruction defined assault as

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[87] RAP 2.5(a).

[88] State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

> an intentional touching or striking of another person, with unlawful force, that is harmful or offensive. It is not necessary that the person assaulted be the same person that the defendant intended to assault.[89]

The evidence in the record is sufficient to support the jury's finding of guilt for assaulting Bartshe under this legal standard. The intent is proven because the assault was the natural consequence of his voluntary act—throwing the bottle.

Contributory Negligence/Proximate Cause

Dowdney claims he cannot be criminally liable for assault against Bartshe because his acts were not the "proximate cause" of Bartshe's injuries. He argues that Bartshe's actions and those of the police (who later used a stun gun on Bartshe several times) acted to intervene, if not supersede, Dowdney's actions. In crimes that are defined to require specific conduct resulting in a specified result, before criminal liability is imposed, the conduct of the defendant must be both (1) the actual cause, and (2) the "legal" or "proximate" cause of the result.[90] In criminal cases, "[p]roximate cause is a cause which in direct sequence, unbroken by any new, independent cause, produces the event complained of and without which the injury would not have happened."[91]

Here, Dowdney's act of throwing the wine bottle injured Bartshe. The bottle throwing was the proximate cause of the injury. No contrary theory was

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[89] Clerk's Papers at 91 (Jury instruction 12).

[90] State v. Rivas, 126 Wn.2d 443, 453, 896 P.2d 57 (1995) (citations omitted).

[91] State v. Gantt, 38 Wn. App. 357, 359, 684 P.2d 1385 (1984).

presented to the jury.

Merger

Dowdney argues that the assault against Bartshe (count III) should merge with his robbery conviction just as the assault conviction against Arena did (count I). This claim has no legal basis.

Suppression of Evidence

Dowdney argues that his counsel never sought to bring in evidence regarding Bartshe's potential bias as a witness because of a lawsuit he initiated against the Bellevue Police Department for his injuries. Before trial, the State moved to exclude this evidence as not relevant. The judge deferred ruling on the motion, and it appears it was not revisited by either party. Neither party introduced evidence of the Bellevue lawsuit.

Dowdney fails to show any error by the judge in deferring ruling on the in limine motion. And the record is simply insufficient to sustain any implied argument of deficiency of counsel. Accordingly, we reject this unpersuasive argument.

Prosecutorial Misconduct

Dowdney claims that the State failed to disclose statements that Bartshe made to a detective concerning thefts at Pete's Wine Cellar on December 9.

At trial, Dowdney's counsel argued that the State violated CrR 4.7 by withholding the detective's notes on several matters. The notes allegedly contained statements by Bartshe to the effect that Dowdney apologized for

assaulting him and included a discussion of the trip from Bellevue Square to Pete's Wine Shop and then to Larry's. These notes did not contain exculpatory evidence, but would have provided the defense a way to strategize its cross examination of Bartshe. The trial court ruled that the State had failed to properly hand over the detective's notes regarding the alleged apology and prevented the State from using or introducing the evidence through testimony. The court also determined that the detective's notes regarding the Pete's Wine Shop discussion did not "rise to the level" of notes that must be disclosed.

Here, relying on Brady v. Maryland,[92] Dowdney claims the State's failure to turn over notes about the Pete's Wine Shop discussion violated his due process right. We disagree.

The trial court's ruling that the notes were not material is consistent with the rule of Brady. There, the Supreme Court announced a rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is ***material*** either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[93] Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

[92] 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (holding that prosecutor's suppression of an accomplice's confession to the murder violated the due process clause of the Fourteenth Amendment).

[93] Id. at 87 (emphasis added).

different."[94]

Failure to Hold Evidentiary Hearing on Juror Misconduct Claim

Dowdney argues he was denied a fair trial due to alleged juror misconduct. Because the record is insufficient to evaluate Dowdney's claimed error, we do not address it.[95]

Ineffective Assistance of Counsel

Dowdney claims his counsel was ineffective for failing to request a lesser included offense instruction for second degree assault. The record does not support such a request.

We reverse all counts and remand for further proceedings.

Cox, J.

WE CONCUR:

[94] United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); In re Pers. Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

[95] See RAP 9.2(b) (appellant to provide an adequate record to review issues raised).

Lau, J.

Becker, J.